In The
Supreme Court of the United States

OCTOBER TERM 1941
NO. 28

CLOVERLEAF BUTTER COMPANY,
Petitioner.

V.

HAYGOOD PATERSON, AS COMMISSONER OF AGRICULTURE AND INDUSTRIES OF THE STATE OF ALABAMA, ET. AL.,
Respondents.

RESPONDENTS' PETITION FOR REHEARING

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Come the respondents, Haygood Paterson, as Commissioner of Agriculture and Industries, and George H. Marsh, as Director of the Division of Agricultural Chemistry, of the State of Alabama, and respectfully petition for a reconsideration by the Court of its judgment and order of February 2, 1942, reversing the judgment of the United States

Circuit Court of Appeals, Fifth Circuit, (116 F.(2) 227), and, as grounds therefor, they assign the following:

I.

That this Honorable Court erred in holding that Section 2325 (and related sections) of the Internal Revenue Code, and the regulations promulgated thereunder, operate to exclude the complementary and cooperative plan provided by Alabama statute for the inspection and regulation of packing-stock butter used in the manufacture in Alabama of renovated butter in interstate and intrastate commerce.

ARGUMENT AND STATEMENT IN SUPPORT OF GROUND I.

The effect of the Court's decision is to destroy the plan whereby Alabama authorities, State and municipal, were working together with Federal authorities to the end that the consumers of renovated butter manufactured in Alabama would not be imposed upon by the use of cheap, foul, filthy and unwholesome packing stock in the manufacture of such renovated butter. Until the Court's decision, the plan worked effectively. There was no friction between the Federal agencies and agents, on the one hand, and the State and municipal agencies and agents, on the other hand. The agents of the United States Department of Agriculture charged with the enforcement of the Renovated Butter Act who made

inspections of the manufacturing plant at Birmingham, acting under the instructions of their legal advisers, recognized that seizure and condemnation of packing-stock butter in the hands of the manufacturer (be it ever so filthy, foul and unwholecome) were beyond the power granted to them by the Congress. They made no attempt to make such seizure or condemnation. They left that phase of the supervision primarily to State and municipal agents charged with the enforcement of the State and municipal food laws and health laws, and, secondarily, to those Federal agents charged with the enforcement of the Federal Pure Food Laws.

This practical and practicable division of the phases of supervision had the effect of making it very difficult for the manufacturer to use cheap, filthy and unwholesome packing stock in the manufacture of renovated butter. The Federal agents charged with enforcement of the Renovated Butter Act made periodic visits of inspection to the manufacturing plant at Birmingham, and took samples of the finished product on almost every visit; but they only took samples of the packing stock in a few instances. During the entire year 1939, these Federal agents made visits of inspection to the manufacturing plant at Birmingham on eight (8) separate days, viz: On January 12, March 3, May 1, June 5, August 14, September 19, October 23 and December 18. During the entire year 1940 they made five (5) such visits of inspection, viz: On January 14, April 2, June 19, September 4 and August 18. And during the entire year 1941, they made six (6) such visits

of inspection, viz: January 15, February 16, April 29, July 9, August 18 and November 5. (See letter of O. E. Reed, Chief, Bureau of Dairy Industry, addressed to George H. Marsh, Director, Division of Agricultural Chemistry, dated February 16, 1942, which is set out in the appendix hereto.)

Although the letter of Mr. Reed, Chief of the United States Bureau of Dairy Industry, only covers the calendar years 1939, 1940 and 1941, a reference to the records of that agency will, we believe, disclose that the number of inspection visits to the manufacturing plant at Birmingham during those years is about average for all of the years during which Cloverleaf Butter Company has been engaged in the manufacture of renovated butter in Birmingham.

The visits made to the plant at Birmingham by these Federal agents were adequate for the enforcement of the Renovated Butter Act, as construed by each succeeding Secretary of Agriculture and Bureau Chief—that is to say, to determine if the plant was kept in a generally sanitary condition, and if manufacturing practices and processes were generally in accordance with the requirements of the Act and of the regulations, and to take occasional samples of the finished product for analyses by experts. But inspection on five, six or eight visits during the calendar year is a far cry from the "continuous surveillance" which the Court's opinion assumes is maintained by Federal agents of the materials and the processes of manufacture.

This long and unbroken administrative construction of the Renovated Butter Act by the Federal agency charged with its enforcement was completely ignored by the Court's opinion.

In view of the long continued administrative construction, we earnestly urge that the crux of the opinion, stated in the conclusion thereof,

> "Congress hardly intended the intrusion of another authority during the very preparation of a commodity subjected to the continuous surveillance and comprehensive specifications of the Department of Agriculture. To uphold the power of the State of Alabama to condemn the material in the factory while it was under Federal observation and while Federal enforcement deemed it wholesome would not only hamper the administration of the Federal Act but would be inconsistent with its requirements. Whether the sanction used to enforce the regulation is condemnation of the material or the product is not significant. Since there was Federal regulation of the materials and composition of the manufactured article, there could not be similar State regulation of the same subject."

is ill advised and is based upon unfounded and unwarranted assumption rather than upon reality.

The complementary and cooperative plan which was in effect until it was struck down by the Court's opinion, we reiterate, was workable and effective. The Federal agency charged with the enforcement of the Renovated Butter Act was not dissatisfied with the Alabama statute and with the action of the Alabama officials thereunder, for the very good reason that they operated upon and supervised a necessary phase of regulation (that is to say, seziure and condemnation of packing stock) which the Congress had not confided to it. The Federal agency charged with the enforcement of the Federal Pure Food Laws was not dissatisfied with the State statute and the State action for the very good reason that it has a long (and, we may add, "court-sanctioned") record and tradition of cooperation with State agencies in matters looking toward the protection of the public health as relates to foods and food products. The manufacturer *was dissatisfied* with the State statute and the State action for the equally good reason that, as administratively construed and as practically applied, there was an excellent opportunity afforded to circumvent the Federal laws; and that, if only the State seizure and condemnation of packing stock could be stifled successfully, the cheapest kinds and types of packing-stock butter (although foul, filthy and unwholesome) could be used in manufacturing, with little probability that the filth could be detected by the most searching microscopic examination of the finished product.

The Court's opinion will upset the long prevailing organization of the Bureau of Dairy Industry,

which had been established for the performance of its functions, as administratively construed. Instead of inspection visits to the manufacturer's plant on five, or six or eight days during the calendar year, an organization will be required to maintain a constant vigil. And the experience of Alabama officials in undertaking to enforce the Alabama statute (before restrained by this Court's opinion) has led to the conclusion that anything less than constant vigil will result in a mockery and a sham.

The Court's opinion will result in complete disruption of the long standing collaboration and cooperation by and between the Federal agency charged with the enforcement of the Federal Pure Food Laws and the Alabama officials, insofar as renovated butter is concerned.

The Court's opinion will result in thousands of unsuspecting consumers of renovated butter being imposed upon because, in many instances, it is practically an impossibility to detect filth in renovated butter which is manufactured from filthy and unwholesome packing stock.

II.

That the Court erred in failing to consider and to apply the presumption raised by Section 314, Title 2 of the Alabama Code of 1940.

ARGUMENT AND STATEMENT IN SUPPORT OF GROUND II.

By General Acts of Alabama, 1919, page 1031, which was codified as Section 4396 of the Alabama Code of 1923, and which was incorporated into the Alabama Code of 1940 as Title 2, Section 314, it is provided:

> "§314. What is prima facie evidence of intent to violate article.—The having in possession by any person, firm or corporation who manufactures or exposes for sale any adulterated or misbranded food within the meaning of this article, shall be prima facie evidence of having in possession with intent to sell in violation of its provisions, except that any manufacturer, wholesaler or jobber, may keep properly identified goods specially set apart in his stock for sale in other states which might otherwise be in violation of the provisions of this article."

The possession of an adulterated food product intended for use in the composition or manufacture of another food product is a use within the prohibition of a pure food statute. *Hipolite Egg. Co. v. United States*, 220 U. S. 45, 54. Cf. *Gibson v. State*, 214 Ala. 38, 106 So. 231.

The Court's opinion specifically referred to only paragraph two of the stipulation limiting the issues, and observed that that paragraph "will crystallize the essential elements of the dispute," - - - and, "as other paragraphs state variations of this controversy * * * we need not consider them further." Obviously, these observations are not accurate.

The first paragraph of the stipulation undertook to present a question based on a situation in which the raw material *only* was in interstate commerce, without reference to whether the finished product was intended for interstate or intrastate commerce.

The second paragraph of the stipulation, as appears from the context, undertook to present a question based on a situation in which both the raw materials and the finished product were in interstate commerce.

There is no allegation in the complaint that any of the packing stock seized by Alabama officials for condemnation was "properly identified and specially set apart," in the manufacturer's stock for use in manufacture of a finished product for sale in other states, and not for sale in Alabama. In the absence of averment of such "proper identification and specially setting apart" the Alabama statute intervened to raise the presumption. As a matter of fact, the complaint, in paragraph nineteen thereof, alleges

facts which show a clear disregard of the presumption statute.

We confess that the motion to dismiss the complaint admitted all facts well pleaded. But it did not admit conclusions of law alleged in the complaint.

The presumption statute was enacted to cure an evil that was widely prevalent in Alabama. Officials charged with the enforcement of the State's pure food laws continuously were confronted with claims by those found in possession of adulterated foods that they were not intended for use or sale in violation of Alabama law, but were intended for, and were being held in the course of, shipment to states where their use or sale was (allegedly) lawful. Of course, in nearly all of such cases the claims were spurious and were made to evade seizure and condemnation of the adulterated articles. But they were efficient and practicable obstacles to enforcement of the pure food laws and were, in many cases, irrefutable. This resulted in a partial breakdown of law enforcement.

Taking cognizance of this situation, the Legislature enacted the presumption statute to "plug the leak". No longer was the unsupported declaration of intention of the person in possession of adulterated foods to be effective to obstruct law enforcement. No longer was the person in possession of such adulterated foods to be permitted to comingle them with other lawful foods and, when they were intercepted

by seizure, to evade the penalty of the law by the device of interposing a spurious claim (irrefutable, as a matter of practicability) that the adulterated articles were intended for shipment to, and use in, another state whose laws allegedly did not forbid their use. More was to be required in order to establish such a claim. The person in possession was to be required to "properly identify and to specially set apart" such adulterated articles in his stock in order to avoid the prima facie presumption.

We confess that the presumption is prima facie and not absolute. But good pleading, in the situation reflected in the allegations of the complaint in this case, would require an affirmative averment that the packing stock seized in the possession of the manufacturer had been "properly identified and specially set apart" for use, when manufactured into renovated butter, in other states; or would require an affirmative averment that no part of it was intended for use in the manufacture of renovated butter for sale in Alabama.

There is no such allegation in the complaint.

Upon the complaint, the motion to dismiss and the stipulation (paragraph one) there is admitted no more than that the packing sock seized was held in possession in prima facie violation of Alabama law. Upon such a showing, the complaint was properly dismissed by the trial court.

Respondents, therefore, respectfully pray that the judgment and order of this Honorable Court reversing the judgment of the Circuit Court of Appeals, Fifth Circuit, be vacated, and that said judgment of said Circuit Court of Appeals be affirmed.

Respectfully submitted,

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We certify that this petition is presented in good faith and not for delay.

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APPENDIX

UNITED STATES DEPARTMENT OF AGRICULTURE

Bureau of Dairy Industry

Washington, D. C.

February 16, 1942

Mr. Geo. H. Marsh, Director
Division of Agricultural Chemistry
Dept. of Agriculture and Industries
515 Dexter Avenue
Montgomery, Alabama

Dear Mr. Marsh:

I have your letter of February 13 requesting information as to the number of inspections and analyses of process or renovated butter made by this Bureau of the factory and product of the Cloverleaf Butter Company, Birmingham, Alabama, during the last three years.

In 1939, inspections were made of this company's factory on January 12, March 3, May 1, June 5, August 14, September 19, October 23 and December 8; in 1940 on January 14, April 2, June 19, September 4 and October 18, and in 1941 on January 15, February 16, April 29, July 9, August 18 and

November 5. In practically every case one or more samples of finished product were taken and submitted to the Micro-Analytical Division of the Food and Drug Administration for examination as to presence of contaminating material and to our own bureau for composition analysis. Dr. F. Allen Hodges was the analyst who usually made the tests in the Food and Drug Administration and Mr. H. Haller in this Bureau. We are unable to give you the exact dates of analysis but usually samples were tested within a short time after submission to these respective analysts. In a few instances samples of packing stock butter and of centrifuge "sludge" were submitted to the Micro-Analytical Division of the Food and Drug Administration for examination.

Very truly yours,

/S/ O. E. Reed

Chief, Bureau of Dairy Industry